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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matters of:

Deployment of Wireline Services
Offering Advanced
Telecommunications Capability

FCC Docket No. 98-188

CC Docket No. 98-147

**COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA
AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF
CALIFORNIA**

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I. Introduction and Summary

The People of the State of California and the Public Utilities Commission of the State of California ("California" or "CPUC") hereby respectfully submit these comments on the notice of proposed rulemaking ("NPRM") regarding the FCC proposal calling for the establishment of advanced services separate affiliates as an optional alternative for incumbent LECs (ILEC) that would allow separate affiliates to offer advanced services without having to comply with ILEC regulations. The NPRM proposes specific structural separation and nondiscrimination requirements in order for an affiliate to be deemed a non-incumbent LEC which would no longer be subject to Section 251(c) of the Telecommunications Act of 1996 (hereinafter, the 1996 Act).¹ The NPRM also proposes rules to ensure that all entities seeking to offer advanced services have adequate access to collocation and loops, which is essential to promote competition in advanced services markets. We concur with the conclusion that states should continue to have flexibility to adopt requirements responsive to issues specific to that state or region.

The CPUC supports the widespread and swift introduction of advanced telecommunications services. We believe that the establishment of separate

¹ Pub. L. 104-104, 110 Stat. 56 (1996). Henceforth, all references to "Section" are to the 1996 Act unless otherwise indicated.

advanced telecommunications affiliates would accomplish this goal on a reasonable and timely basis. Separate affiliates are a viable alternative to imposing ILEC regulations on those companies that seek to offer advanced services, provided that structural safeguards and nondiscrimination requirements are in place. California also believes that all entities seeking to offer advanced services should have equal access to collocation and loops, as it is necessary for them to be able to compete in providing ADSL services.²

The NPRM also seeks comments on whether a truly separate affiliate of an incumbent LEC may provide advanced telecommunications services without complying with the obligations of Section 251(c). The NPRM concludes that the obligations of Section 251(c), including unbundling and offering for resale at wholesale prices, are applicable only to incumbent LECs, and a truly separate affiliate of an incumbent LEC is not obligated to comply with Section 251 (c). (NPRM, ¶ 94.) This appears to be a reasonable approach, provided that the separate affiliate is truly separate, meaning that it operates independently, has separate facilities, maintains separate books and records, has separate officers, directors, and employees, and the ILEC does not discriminate in favor of its affiliate.

² See CPUC Comments on the Petition of Southwest Bell, Pacific Bell, and Nevada Bell on Relief from Regulation, p. 6 (CC Docket 98-91, July 9, 1998)

II. DISCUSSION

A. A Separate Advanced Services Affiliate Must Comply with Structural Separation and Non-Discrimination Requirements in Order Not to be Treated As An Incumbent LEC.

Under the 1996 Act, the obligations of Section 251(c) apply only to incumbent LECs.³ An incumbent LEC is defined as either a member of NECA as of the date of the 1996 Act was enacted, or a successor or assign of such a member. (47 U.S.C. § 251(h)(1).) The NPRM proposes that in order for a separate affiliate *not* to be treated as an incumbent LEC, and thus exempt from the obligations of Section 251(c), structural separation and nondiscrimination requirements must be met.⁴ Specifically, the NPRM proposes the following separation requirements for non-incumbent LEC status: 1) the incumbent must operate independently from its affiliate; 2) the transactions must be on an arm's length basis, reduced to writing, and available for public inspection; 3) the incumbent and affiliate must maintain separate books, records, and accounts; 4) the incumbent and advanced services affiliate must have separate officers, directors, and employees; 5) the affiliate must not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the incumbent; 6) the incumbent LEC must not discriminate in favor of

³ Section 251(c) mandates additional obligations on incumbent LECs, such as the duty to negotiate, interconnection, unbundled access, resale, collocation, and the duty to provide reasonable public notice of changes in information necessary for transmitting and routing services using the LEC's facilities.

⁴ The structural and transactional requirements are set forth in Section 272(b), while the nondiscrimination safeguards are contained in Section 272(c).

its affiliate; and 7) the advanced services affiliate must interconnect with the incumbent LEC pursuant to a tariff or an interconnection agreement, and whatever network elements, facilities, interfaces and systems are provided by the incumbent LEC to the affiliate must also be made available to unaffiliated entities. (NPRM, ¶¶ 95-96) Under the construct of a truly separate affiliate, as proposed in the NPRM, the separate affiliate would neither be seen "to stand in the shoes of" an ILEC, nor be considered a successor or assign of an ILEC. Therefore, Section 251(c) should not apply.

If a separate affiliate is to be used to provide advanced telecommunications services free of ILEC regulations, certain safeguards must be met. California believes that in order for an affiliate of an BOC that provides advanced services to be exempted from the requirements of Section 251(c), the affiliate must be required to operate independently from its BOC affiliate, as is required of a BOC's Section 271 affiliate, and in a manner consistent with that of competitive advanced service providers which have no affiliation with a BOC. The CPUC therefore maintains that a distinct burden must be placed on the BOC and its advanced services affiliate to demonstrate operational independence from the BOC and that the affiliate will be afforded no special treatment, or benefit due to its corporate relationship with the BOC. This position reflects the view that competitors of the advanced services affiliate should be treated in a nondiscriminatory manner by the BOC.

B. The FCC's Accounting Safeguards, Cost Allocation Rules, and Affiliate Transaction Pricing Standards Should Apply to Separate Affiliates.

In addition to demonstrating operational independence and nondiscrimination, separate affiliates should be required to comply with appropriate accounting safeguards to govern transactions between the BOC and the advanced services affiliate in order to protect against cross-subsidization of the affiliate's operations, or other anti-competitive behavior. California submits that the structural and transactional requirements and nondiscrimination safeguards contained in Section 272(b) and (c) provide an appropriate framework for obtaining the type of information necessary to analyze the level of independence of a BOC's advanced services affiliate. The CPUC recommends that as part of the process for evaluating applications of a BOC affiliate requesting authority to become a certificated provider of advanced telecommunications services, the application should be required to contain verifiable documentation addressing each component of the structural and transactional requirements, as well as the nondiscrimination requirements of Section 272(c). Operational independence should be clearly demonstrated, beginning from the planning stages of the affiliate's operations and the formation of the organization, continuing through the time the affiliate applies for authority to become a telecommunications provider. The application should also be required to contain a statement made under the penalty of perjury, by the controlling officer of the BOC and the advanced services

affiliate, that operational independence will be maintained throughout the existence of the affiliate, or until such time as operational independence is no longer a regulatory requirement.

Further, to ensure appropriate pricing for transactions between the advanced services affiliate and to deter BOC cross-subsidization of the advanced services affiliate's operations, the CPUC submits that the cost allocation rules and affiliate transaction pricing standards adopted in CC Docket No. 96-150 (*In the Matter of Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17539.) should apply. The respective application of these rules to out-of-region and certain types of incidental interLATA services that may be provided by incumbent LECs on an integrated basis, should be used as the criteria for valuing and pricing transactions between the BOC to the advanced services affiliate. (See CC Docket No. 96-150, ¶ 75 for the criteria for valuing the transactions, and ¶¶ 156-154 for the pricing of such transactions.)

III. CONCLUSION

The widespread availability of advanced telecommunications services is essential to realizing one of the fundamental goals of the Telecommunications Act, which is to promote innovation in order to stimulate competition for all services. California supports the introduction of advanced services and believes that separate affiliates are a viable, optional alternative that may be used to

accomplish this goal, unencumbered by regulations applicable to incumbent LECs, provided that they comply with specific safeguards. If structural safeguards and nondiscrimination requirements, as discussed herein, are put in place, the result would inure to the benefit of all players in the market, as well as to consumers. Accordingly, the CPUC respectfully submits these comments for the Commission's consideration in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document entitled COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA upon all known parties of record in this proceeding by mailing by first-class a copy thereof properly addressed to each party.

Dated at San Francisco, California this 25th day of September, 1998.

/s/ CHARLENE D. LUNDY

Charlene D. Lundy